98-5881 (2)

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FILED
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SUPREME COURT, U.S.

BENJAMIN LEE LILLY,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

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Petition for a Writ of Certiorari to the Supreme Court of Virginia

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner respectfully requests leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Petitioner has not previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's declaration in support of this motion is attached hereto.

Benjamin Lee Lilly

Benjamin Lee Lilly

191047

43 pp

No.

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BENJAMIN LEE LILLY,
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v.

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Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Virginia

DECLARATION IN SUPPORT OF MOTION TO PROCEED *IN FORMA PAUPERIS*

I, Benjamin Lee Lilly, am the petitioner in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress. I further declare, under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I am presently incarcerated in the Sussex 1 State Prison, 24414 Musslewhite, Waverly, Virginia 23819-1111. I have no sources of income.

2. I have not received, during the past twelve months, any income from any business, profession, or other form of self employment, or in the form of rent payments, interest, dividends, or other sources.

3. I do not own any cash or have a checking or savings account.

4. I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

5. I have one dependent, Loretta Lilly, who is my wife.

6. For the reasons stated, I respectfully request that I be permitted to file the attached petition for a writ of *certiorari* without prepayment of costs and to proceed *in forma pauperis*.

I declare under penalty of perjury that the foregoing is true and correct.

Dated. Sussex 1 State Prison
Waverly, Virginia
~~August~~ September 1, 1998

Benjamin Lee Lilly
Benjamin Lee Lilly

191048

No.

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Petition for a Writ of Certiorari to the Supreme Court of Virginia

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PETITION FOR A WRIT OF CERTIORARI

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98-5881

Lilly
v.
Virginia

QUESTIONS PRESENTED

(CAPITAL CASE)

I. Whether the admission into evidence of a custodial confession by an alleged accomplice, which confession inculpates a criminal defendant in a capital murder case, consistently minimizes the declarant's role and shifts blame onto others, offered under a state exception to the hearsay rule as a declaration against interest of an unavailable witness because the declarant refused to testify under the Fifth Amendment, violates the Confrontation Clause of the Sixth Amendment?

II. Whether there is a firmly rooted exception to the hearsay rule which would permit the admission into evidence of a custodial confession by an alleged accomplice, which confession inculpates a criminal defendant in a capital murder case, consistently minimizes the declarant's role and shifts blame onto others, without violating the Confrontation Clause of the Sixth Amendment?

III. In assessing the reliability of the hearsay statements of an unavailable declarant, offered as a declaration against interest, whether the Sixth and Fourteenth Amendments prohibit consideration of corroborating evidence other than the circumstances surrounding the making of the statement?

PARTIES

All of the parties to the proceedings below are listed in the caption of the case, *supra*. *See* Sup. Ct. R. 14.1(b).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No.

BENJAMIN LEE LILLY,
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COMMONWEALTH OF VIRGINIA,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

PETITION FOR A WRIT OF CERTIORARI

Benjamin Lee Lilly (hereafter "Petitioner" or "Ben Lilly") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia affirming his conviction and sentence of death.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia is officially reported at 255 Va. 558, 499 S.E.2d 522 (1998), and appears in Appendix A of this petition. The rulings of the Circuit Court of Montgomery County (the trial court) were not reported and appear in Appendix B.

JURISDICTION

This petition seeks review of the final judgment of the Virginia Supreme Court in this matter, entered April 17, 1998, as to which a motion for rehearing was denied on June 5, 1998.

The order on rehearing appears in Appendix C of this petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The texts of the Sixth and Fourteenth Amendments to the United States Constitution (the "Constitution") are reprinted in full at Appendix D, pursuant to Supreme Court Rule 14.1(f).

SUMMARY OF THE ARGUMENT

1. This Court has consistently held that the Sixth and Fourteenth Amendments prohibit the admission of an accomplice's custodial confession at the criminal trial of a defendant because such statements are inherently unreliable. *See, e.g., Lee v. Illinois*, 476 U.S. 530 (1986). Following this fundamental principle, the United States Circuit Courts of Appeals – confronting post-arrest hearsay statements by an accomplice, made while in custody and in response to police interrogation, which incriminate another and which peripherally incriminate the declarant, but which minimize the declarant's role in the criminal activity and shift blame to others in an attempt to curry favor – have uniformly concluded that such statements are inadmissible under the Confrontation Clause. Notwithstanding these well-established principles, the Virginia Supreme Court upheld admission of an unavailable accomplice's statements to police, finding that they fell within a firmly rooted exception to the hearsay rule.

There are special and important reasons warranting this Court's exercise of its discretion to issue a writ of certiorari to review the Virginia Supreme Court's decision in this regard. That decision is in direct conflict with established precedents of this Court interpreting the Sixth and Fourteenth Amendments, as well as precedent from every United States Circuit Court of Appeals confronting similar circumstances. Sup. Ct. R. 10(b). Certiorari is also warranted to review the judgment below in this regard because the unconstitutional admission of unreliable evidence not subject to cross examination unquestionably substantially contributed to Petitioner's conviction and death sentence.

2. This Court has made clear, in a case involving a confession by an accomplice that incriminated a criminal defendant, that the general category of statements against interest is too large a class for meaningful Confrontation Clause analysis, *Lee v. Illinois*, 476 U.S. 530, 544 n.5 (1986), and that such statements do not fall within any recognized hearsay exception, *Williamson v. United States*, 512 U.S. 594, 601, 604-05 (1994). The Virginia Supreme Court nevertheless concluded that the custodial confession of an accomplice incriminating a criminal defendant was admissible because it falls within a firmly rooted hearsay exception.

There are special and important reasons warranting this Court's exercise of its discretion to issue a writ of certiorari to review the Virginia Supreme Court's decision in this regard as well. The Virginia Supreme Court's decision is in direct conflict with established precedents of this Court interpreting the Sixth and Fourteenth Amendments. Sup. Ct. R. 10(b). Review by certiorari is also warranted because the United States Circuit Courts of Appeals and state courts of last resort are divided as to whether the hearsay exception for statements against penal interest, as specifically applied to custodial confessions from an accomplice who is unavailable to testify at trial, is a firmly rooted exception to the hearsay rule. Finally, as above, certiorari is warranted to review the judgment below in this regard because the unconstitutional admission of unreliable evidence not subject to cross examination unquestionably substantially contributed to Petitioner's conviction and death sentence.

3. This Court has made clear that the Sixth and Fourteenth Amendments prohibit consideration of corroborating evidence in assessing the reliability of hearsay statements of an unavailable declarant, stating unequivocally that only the circumstances surrounding the making of the statement are to be considered. *Idaho v. Wright*, 497 U.S. 805 (1990). The Virginia Supreme Court ignored that controlling guidance and expressly and impermissibly based its decision concerning the reliability of the hearsay statements based on other supposed evidence at trial corroborating the hearsay statements.

There are special and important reasons warranting this Court's exercise of its discretion to issue a writ of certiorari to review the Virginia Supreme Court's decision in this regard as well.

The Virginia Supreme Court's decision is in direct conflict with established precedents of this Court interpreting the Sixth and Fourteenth Amendments. Sup. Ct. R. 10(b). Review by certiorari is also warranted because the United States Circuit Courts of Appeals and state courts of last resort are divided in the manner and extent to which they follow the established precedents of this Court, and those decisions conflict with controlling decisions of this Court which prohibit consideration of corroborating evidence in assessing the reliability of the hearsay statements of an unavailable accomplice. Finally, as with the prior issues, certiorari is warranted to review the judgment below in this regard because the unconstitutional admission of unreliable evidence not subject to cross examination unquestionably substantially contributed to Petitioner's conviction and death sentence.

STATEMENT OF THE CASE

On December 5, 1995, Alexander V. DeFilippis ("DeFilippis") was carjacked and subsequently murdered. This took place after three individuals – Gary Wayne Barker ("Barker"), Petitioner and Mark Lilly – had been on a binge, drinking and smoking marijuana, beginning the prior day. On December 4, 1995, after beginning their drinking and smoking, the three men broke into a friend's house, stole several guns, a safe (which they broke open) and a quantity of liquor. JA 2033-34.[1] The three then continued to drink and smoke marijuana.

The next day, December 5, 1995, the three men fired the stolen guns at some geese, killing one which they put into the trunk of the car they were driving. JA 2043. Later that day, the car they were using broke down in the vicinity of a convenience store near Heathwood, Virginia. JA 2050. DeFilippis was standing outside another car at the convenience store. JA 2053. He was ordered in the car, the car was hijacked and DeFilippis was subsequently murdered. JA 2054-

[1] Citations to "JA __" are to the joint appendix in the appeal to the Supreme Court of Virginia. All cited portions thereto are reproduced at Appendix F, pursuant to Supreme Court Rules 14.1(g)(i), (i)(v).

2064. The three men then left the body and bought some beer. JA 2065-66. They later robbed a convenience store, JA 2069-2071, and attempted to rob a second convenience store in Giles County. JA 2076-2078. A short time later, the car broke down and police arrived shortly thereafter. JA 2078-2080. All three men were arrested. JA 2082, 2086.

Petitioner was charged with the abduction and robbery of DeFilippis; carjacking; murder as part of the commission of the robbery of DeFilippis; and the use of a firearm in the foregoing offenses and the unlawful possession of a firearm. JA 3-11. At Petitioner's five-day trial, which began on October 21, 1996, the state's principal evidence consisted of the testimony of Barker, who had received a plea bargain on the same charges facing Petitioner, and the admission of a confession by Mark Lilly, who had also received a plea bargain on the same charges. Barker's testimony was contradicted in numerous respects by others and was also inconsistent in numerous respects with Mark Lilly's confession. Mark Lilly's confession was, in the main, exculpatory of Mark Lilly. Although he minimally and peripherally inculpated himself in lesser crimes, the principal thrust of the confession was to place the blame for the capital crime on Petitioner, and to shift blame for most aspects of the crimes to Petitioner or Barker. The trial court admitted the confession of Mark Lilly without basis in law. Absent that confession in the record, there was scant credible evidence of capital murder against Petitioner.

The Barker Testimony

Barker testified that he, Petitioner, and Mark Lilly, spent the day before and the day of the murder drinking a considerable amount of liquor and that he and Mark Lilly had also been smoking marijuana. Barker described the robbery of a residence the night before, and stated that when their car broke down the next day, Petitioner confronted DeFilippis, who was nearby standing next to his vehicle, ordered him into the car at gunpoint, robbed him of his wallet, called Barker and Mark Lilly over to the car, drove to a secluded area and shot DeFilippis. Barker then described the robberies of two convenience stores following the murder, and testified that he was arrested as he sat in a ditch with a rifle in his mouth and called out for the police to tell his mother

that he loved her, wanting to kill himself "[f]rom what I seen and, and, and, and for what I did." JA 2082-84, 2147.

Barker's testimony was impeached by other witnesses on numerous points:

First, Barker testified that Ben Lilly shot DeFilippis at point blank range. JA 2148. On the contrary, Dr. David Oxley, a forensic pathologist and deputy chief medical examiner for West Virginia, testified that the victim's wounds revealed no gunshot residue, which would indicate shots fired from a greater distance. JA 1973, 1975.

Second, Barker denied having seen Joyce and Michael Lang the day before the murder and denied telling them that he could kill his best friend and not regret it. JA 2124. On the contrary, Joyce Lang testified that Barker had said "[t]hat he could kill his best friend without regretting it," and that she had therefore not wanted her son to go out with Mark Lilly and Barker. JA 2504.

Third, Barker denied that later on December 4, 1995, he pointed a gun at or threatened A.J. Falls, an acquaintance whom they visited, and denied that Mark Lilly had pulled the hammer back on a pistol and pulled it out to threaten anyone. JA 2121-22. Falls testified, however, that Barker pointed a rifle at him, JA 2438-39, and that later, when words were exchanged with a neighbor, Mark Lilly pulled the hammer back on the pistol he was carrying inside his sweater jacket, exposed the gun and gave the impression that he was going to pull it out, JA 2445-48.

Fourth, when asked whether at a bar that same night, he pulled out a gun and Ben Lilly admonished him to put the guns away, Barker testified, "Definitely not." JA 2125. Once again, to the contrary, Ron Lucas testified that he was shown a rifle by Barker, and stated that when Barker did so, Petitioner told Barker to "put the, the God damn guns away." JA 1615.

Fifth, Barker denied having pointed a gun at Howard Barnett, one of the owners of the first store that was robbed. JA 2139. Both Mr. and Mrs. Barnett, who was also in the store when the robbery occurred, testified that Barker pointed a gun at him. JA 2474, 2545.

Finally, Barker denied saying to Bill Williams, who attempted to prevent the second convenience-store robbery, that he would blow his head off, while pointing a gun at his forehead. JA 2126. Mr. Williams testified, however, that Barker, after struggling with him and while

holding a gun to his head, said, "I'll blow your head off," and Mr. Williams then directed the clerk to hand over "the damn money." JA 2576. Mona Hylton, the clerk working in the store at the time of the robbery, also testified that Barker pointed the gun at Williams' head, adding that Barker had pulled the hammer back on the gun. JA 2597-98.

Thus, absent additional direct evidence implicating Ben Lilly in capital murder, Barker's testimony was a weak foundation for conviction.

The Mark Lilly Confession

Support for that weak foundation to convict Ben Lilly of capital murder was unconstitutionally provided by the confession of Mark Lilly. At trial, the state called Mark Lilly as a witness, but he invoked his Fifth Amendment privilege. JA 2243-44. Contending that Mark Lilly was therefore unavailable as a witness, the state sought to introduce two statements he had made to police while in custody as declarations against interest. JA 2218-22. Petitioner objected, arguing that admission of the statements would violate the Confrontation Clause because they were self-serving, minimizing Mark Lilly's culpability by shifting responsibility for the alleged crimes to Barker and Petitioner, and therefore unreliable. JA 2212-2217. The trial court overruled Petitioner's objection and admitted the statements in their entirety, finding that the statements were against Mark Lilly's penal interest and therefore reliable, and that their admission would not violate the Confrontation Clause because they were admitted under a firmly rooted hearsay exception. JA 2226-27. The trial court based its determination of the reliability of the statements on "the evidence and exhibits before it and the facts and circumstances of this particular case[,]" and its examination of "whether there is any other substantial link to connect [Petitioner] with the crime other than the statements that are at issue here." JA 2227.[2]

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[2] The foregoing also is submitted in compliance with Supreme Court Rule 14.1(g)(i) concerning preservation in the trial court of the federal questions sought to be reviewed. The trial court overruled the objection. JA 2226-27. Petitioner raised the claim before the Supreme Court of Virginia on appeal. Opening Brief of Appellant to the Supreme Court of Virginia at 28-32 (arguing that the trial court's

Footnote continued

In his statements to police,[3] Mark Lilly repeatedly offered claims of mitigating circumstances and also consistently shifted primary responsibility to others. Mark Lilly began by explaining that he, Ben Lilly and Barker had started drinking the day before, JA 2256, 2319, and had "partied all night," JA 2318, that he had awoken drunk that morning and that he had been drinking liquor -- "Vodka, Evan Williams, Jim Beam, a little bit of everything" -- all that day, JA 2258. Throughout his statement, Mark Lilly relied on his drunkenness as an excuse for his lack of memory as well as for his actions.[4]

Footnote continued from previous page

admission of evidence of a co-defendant's statement as statements against penal interest violated the confrontation clause, and the Fifth, Sixth, And Fourteenth amendments to the Constitution). The Virginia Supreme Court rejected the argument. *Lilly v. Commonwealth of Virginia*, 499 S.E.2d 522, 534 (Va. 1998). Petitioner again raised the claim on a petition for rehearing. Appellant's Petition for Rehearing in the Supreme Court of Virginia at 1 (contending that the court erred in upholding the admission of Mark Lilly's out of court statement). The Virginia Supreme Court denied the petition. (All cited portions concerning preservation are reproduced separately at Appendix E, pursuant to Supreme Court Rule 14.1 (g)(i).)

3 The officers explained to Mark Lilly that by speaking with them he could "at least offer the court the fact that you did own up to it and was willing to take responsibility for what occurred." JA 2257. When Mark Lilly became concerned that he would be incarcerated for "armed robbery" and "some kind of murder charge," the officers explained, "That's why we're talking to you, we're trying to help you right now . . . ." JA 2324. *See* JA 2326 ("We're trying to help you . . . .").

4 JA 2257-58 ("What time did ya'll leave that residence this morning? I have no idea. . . . Besides, I've been drunk all day, I was drunk when I got up."); JA 2258-59 ("So you went to a residence, you got the liquor out, and what else did you get? I don't, I don't really know, you know, everything that was got out cause I was drunk."); JA 2263 ("So did all of ya'll load into the car then? I had to or get left man, I was so drunk."); JA 2264 ("Anything that you remember about him? What he was wearing or anything that stood out? I don't really remember man, I was so drunk."); JA 2273 ("You didn't pay for it, you just took it? Right, I was so drunk, I don't do that shit, you know, if I'm sober."); JA 2276 ("Did ya'll discuss it before you went in, say 'Ben you stay here and we're gonna go in and rob this' or what was the discussion? We was all so drunk."); JA 2318 ("If you would, let's talk about how did yesterday start off? I was drunk. . . . I was drunk. . . . Drunk as I ever been."); JA 2321 ("Anything else you can think of? Not that I can think of. I was so drunk. I was drunk when you brought me in here at 1:30 this morning."); JA 2321-22 ("What do you remember next? . . . Drunk as shit, that's all I remember."); JA 2323 ("Ben told ya[']ll to come on? Yeah, we was drunk."); JA 2324 ("What did they, where were the rifle and shotgun at that time? I don't even know. I wasn't worried about no gun. I was drunk, the only thing I keep up with man is the beer.").

Despite the testimony of Barker and the statement of Mark Lilly regarding the large amounts of alcohol the three men consumed the night before and the day of the murder, the trial court refused to provide an

Footnote continued

Having attempted to establish his drunkenness as an excuse, Mark Lilly then proceeded to minimize his role in every aspect of the alleged crimes, consistently shifting blame onto Barker and Petitioner. First, Mark Lilly addressed the theft from the friend's residence the night before the murder. He said Petitioner stole liquor from the residence, JA 2258, and stated that Petitioner and Barker also stole "some guns or something," JA 2259.

Second, Mark Lilly identified Petitioner as the one who pulled the gun during the carjacking, JA 2262, 2322, placing himself passively in the car while the carjacking was occurring. JA 2322. When asked if he had ridden away in the carjacked car, he explained that he "had to [get in the car] or get left man." JA 2263. He further denied having a gun while riding in the car. JA 2264.

Third, Mark Lilly stated that he had "nothing to do with the shooting," going so far as to even deny having exited the car when DeFilippis was shot. JA 2265, 2267, 2326, 2331. He explained that he thought Petitioner was going to leave the victim outside the car and just take the car. JA 2268.

Fourth, with respect to the robbery of the first convenience store, Mark Lilly said simply that "they wanted to rob it." JA 2272. He added that either Petitioner or Barker was armed, but denied carrying a weapon himself, and identified Petitioner as having stolen the money from the store. JA 2272, 2274. In his most direct inculpatory admission, Mark Lilly confessed that he stole a twelve pack of beer from that store; however, he quickly explained that he did so only because he was drunk. JA 2272-73.

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instruction on intoxication. The trial court also refused to exclude from evidence blood stains found on Petitioner's pants despite the fact that the state's expert could not determine whether the blood was human blood (or goose blood) and testimony from Barker that the three had shot and killed a goose which they had then placed in the trunk of their car. These rulings by the trial court, although not raised in this petition, further deprived Petitioner of a fair trial.

Finally, with respect to the robbery of the second convenience store, Mark Lilly again denied carrying a weapon, and identified Barker as being armed. JA 2275. He explained that Barker confronted the clerk, brandishing a gun and announcing that this was a robbery. JA 2276. When asked about shots fired from the car as they made their escape, he said he did not know who fired the shot out the window, but denied that he had done so. JA 2277.

Accordingly, if Mark Lilly's statements to police are credited, he was drinking significant amounts of alcohol and was merely present when the various crimes he described occurred. However, he never admitted making a single decision with respect to any of the crimes, other than deciding to get in the victim's car so as not to be left behind; he never admitted carrying or brandishing a weapon during the carjacking or the robberies; he never admitted stealing anything from their friend's house; he only admitted stealing beer from the convenience stores, and then only because he was drunk; and he never admitted even speaking to the victim. That is not the type of statement against penal interest which may constitutionally be used against a capital murder defendant, or any other criminal defendant.

Mark Lilly refused to testify at trial, invoking his Fifth Amendment privilege against self-incrimination. At the sentencing hearing, Mark Lilly recanted his statements to police, testifying that he had lied to the authorities – specifically, that he had robbed the victim and that at the time of the murder he was vomiting near the other side of the car and therefore could not say who committed the murder. JA 3095-97, 3098. He explained that when "[t]he investigator started talking all these life sentences . . . I could get . . . I got scared . . . [and] [t]hr[e]w it off on somebody else." JA 3096. He further explained that he blamed the murder on Ben Lilly, and not Barker, because he feared what Barker might say about him: "Well, me and Gary, we, we've been, we've been in a whole lot of trouble together and Gary knows a whole a lot on me . . . ." JA 3102.

The Contradictions Between Barker and Mark Lilly

Barker's testimony contradicted Mark Lilly's statements to police on several points, particularly with respect to Mark Lilly's own culpability.

First, while Mark Lilly placed himself in the car during the carjacking, Barker stated that he and Mark Lilly were walking towards the woods with the guns and liquor. JA 2051.

Second, Mark Lilly said that he was in the car when the shooting occurred, and that only Petitioner and DeFilippis had gotten out, JA 2237, but Barker stated that all four had gotten out of the car. JA 2057.

Third, while Mark Lilly denied having a weapon in the car, Barker testified that Mark Lilly was carrying a pistol in his pants. JA 2057.

Fourth, Mark Lilly stated that Petitioner shot DeFilippis from about "ten to fifteen yards" away, JA 2268, whereas Barker testified that Lilly shot him at point blank range, JA 2148. Barker testified, moreover, that Mark Lilly ordered DeFilippis to start walking away from the car, and that Petitioner asked Mark Lilly for the pistol which he was carrying, events which Mark Lilly completely omits. JA 2061, 2063-64.

Fifth, Mark Lilly stated initially that nothing was said when Petitioner returned to the car after the shooting, JA 2269, 2329-30, but later asserted that he and Barker said, "Goddamn. Motherfucker shot him," and that Petitioner responded, "I shot the dude and I think he's dead," JA 2331-32. Barker testified, however, that he and Mark Lilly asked Petitioner why he had done it and that Petitioner had responded that he did not want to return to the penitentiary. JA 2065.

Finally, while Mark Lilly said that Petitioner stole the money from the first convenience store, Barker testified that Mark Lilly rifled through the cash register. JA 2073.

Thus, Barker's testimony did not corroborate Mark Lilly's custodial statements to the police. The only evidence the state introduced which it relied upon to corroborate Mark Lilly's statements were (1) allegedly inculpatory statements made by Petitioner to officer Whitsett at the scene of Lilly's arrest; (2) Petitioner's statements to Mark Lilly to give himself up because he was "not the one who has done anything wrong"; and (3) forensic testimony about blood on

Petitioner's pant leg.[5] Brief of the Commonwealth in the Supreme Court of Virginia at 34-35. There were no fingerprints on the murder weapon or any other physical evidence linking Petitioner to the murder. The trial court relied upon that allegedly corroborating evidence in admitting Mark Lilly's statements, and not upon any inherent indicia of trustworthiness, of which there were none.[6]

The jury, focused on the weakness of the direct evidence, requested clarification on the meaning of circumstantial evidence, JA 3418, and ultimately found Petitioner guilty on all charges. On appeal, the Virginia Supreme Court concluded that Petitioner's right of confrontation was not denied by the admission of Mark Lilly's statements to police. The court rejected Petitioner's argument that Mark Lilly's statements to police, which sought to limit Mark Lilly's own culpability by implicating others, were inherently unreliable. According to the Virginia Supreme Court:

> [I]n determining the admissibility of a statement against penal interest made by an unavailable declarant . . . , the crucial issue to be resolved by the trial court is the reliability of the statement in the context of the facts and circumstances under which it was given. Here, the record clearly shows that Mark Lilly was cognizant of the import of his statements and that he was implicating himself as a participant in numerous crimes for which he could be charged, convicted, and punished. Elements of Mark Lilly's statements were independently corroborated by Barker's testimony, by the physical evidence, and by the correspondence between Mark Lilly's account and the accounts of other persons acquired by law enforcement authorities. Thus, the statements were clothed in sufficient indicia of reliability to overcome the hearsay bar . . . . That Mark Lilly's statements were self-serving, in that they tended to shift principal responsibility to others or to offer claims of mitigating circumstances, goes to the weight the jury could assign to them and not to their admissibility.

499 S.E.2d at 534. Finding that declarations against penal interest constitute a firmly rooted exception to the hearsay rule in Virginia, the court held that Petitioner's right to confrontation was not violated by admission of Mark Lilly's statements to police. *Id.*

As we shall now demonstrate, that decision was fundamentally flawed. As noted at the outset, this Court has consistently held that the Sixth and Fourteenth Amendments prohibit the admission of a custodial confession of an accomplice at the separate trial of a defendant because such statements are inherently unreliable. Moreover, contrary to the views of the Virginia Supreme Court, the United States Circuit Courts of Appeals have uniformly concluded that post-arrest statements, made while in custody in response to police interrogation, which incriminate another and peripherally incriminate the declarant, and shift blame to others in an attempt to curry favor, are inadmissible. Furthermore, this Court has made clear that the general category of statements against interest is too large for meaningful Confrontation Clause analysis, and that custodial statements by an accomplice that incriminate a criminal defendant do not fall within a recognized hearsay exception. This Court has also made clear that the Sixth and Fourteenth Amendments prohibit consideration of corroborating evidence in assessing the reliability of the hearsay statements of an unavailable declarant, stating unequivocally that only the circumstances surrounding the making of the statement are to be evaluated. As a result, there are special and

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5 The Virginia Supreme Court also relied on evidence showing a "correspondence between Mark Lilly's account and the accounts of other persons acquired by law enforcement authorities." *Lilly*, 499 S.E.2d at 534. The identity of these accounts is unclear. The court may have been referring to statements by witnesses about the robberies that occurred later in the evening. Those accounts, however, do nothing to support Mark Lilly's statements about who committed a murder at a different place and time from the robberies.

6 The evidence relied upon by the state to corroborate Mark Lilly's statements should not have been considered and was not truly corroborative. (1) Police Chief Whitsett's assertions that Ben Lilly asked to be killed the night he was arrested and then responded "me" to the statement by Whitsett, "what does a murderer look like anyway?", JA 2197, are not truly corroborative of Mark Lilly's statements. That exchange between Petitioner and Whitsett shows that Petitioner was upset that he was involved in anything related to the murder, without showing that Petitioner was directly involved in the shooting. Indeed, if such conduct evidences Petitioner's guilt, the same must be said for Barker, who, when he was arrested, was found sitting with a shotgun in his mouth. (2) Likewise, Petitioner's alleged warnings to Mark Lilly to turn himself in, JA 2187, only serve to exculpate Mark Lilly; they do not affirmatively corroborate Mark Lilly's statements that Petitioner committed the murder. (3) Finally, the state's own expert admitted that the evidence concerning the blood on the pant leg was inconclusive and that it could have been non-human (for example, goose) blood. JA 2016.

important reasons for this Court to exercise its discretion and grant the petition for a writ of certiorari to prevent the wrongful and unconstitutional execution of Ben Lilly.

REASONS FOR GRANTING THE WRIT

I. Admission Of Mark Lilly's Post-Arrest Statements Violated Petitioner's Sixth Amendment Right To Confrontation Because A Post-Arrest Statement, Made By A Non-Testifying Accomplice In The Course Of Custodial Interrogation, Which Incriminates The Defendant and Peripherally Incriminates The Declarant, And Which Shifts Blame To The Defendant, Is Inherently Unreliable And Therefore Inadmissible.

Petitioner's conviction rests squarely on the uncross-examined hearsay statements of Mark Lilly, statements made under circumstances which this Court has repeatedly held render the statements presumptively unreliable and inadmissible under the Confrontation Clause. Mark Lilly's statements were made following his arrest, while he was in custody and in response to police questioning. The statements were made after he was told that the court would be informed of his cooperation. Those circumstances provided Mark Lilly a strong incentive to shift or spread blame, curry favor, or divert attention to another, which is precisely what he did. Mark Lilly, throughout the statements, consistently relied on his drunkenness and, more important, minimized his role in the robberies and the murder and shifted blame to Barker and Petitioner. Indeed, if Mark Lilly's statements are credited, he merely happened to be present, not initiating any criminal activity, not holding a gun during the robberies and not exiting the car when the carjacking or the murder occurred, and only stealing beer because he was drunk. As this Court and every Court of Appeals confronting similar facts has concluded, Mark Lilly's statements were made under circumstances that render them inevitably suspect. Admission of these statements into evidence, without the opportunity for cross-examination, violated Petitioner's right to confrontation under the Sixth Amendment.

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him." U.S. Const. amend. VI. As this

Court has observed, "'[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in the expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.'" *Lee v. Illinois* , 476 U.S. 530, 540 (1986) (citation omitted). The right to confront and cross-examine adverse witnesses fulfills this requirement first by "contribut[ing] to the establishment of a system of criminal justice in which the perception . . . of fairness prevails," and "ensuring that convictions will not be based on the charges of unseen and unknown -- and hence unchallengeable -- individuals." *Lee*, 476 U.S. at 540. Critically, the right to confront and to cross-examine witnesses "promotes reliability in criminal trials." *Id.* As this Court has counseled, confrontation and cross-examination advance the pursuit of truth by

> "(1) ensur[ing] that the witness will give his statements under oath--thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forc[ing] the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; (3) permit[ting] the jury that is to decide the defendant's fate to observe the demeanor of the witness making his statement, thus aiding the jury in assessing his credibility."

Id. (quoting *California v. Green*, 399 U.S. 149, 158 (1970)) (footnote omitted).

In *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), this Court established "a general approach" for determining when statements incriminating a defendant and falling within an exception to the hearsay rule are admissible under the Confrontation Clause and this Court reiterated that general approach in *Idaho v. Wright*:

> "First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . , the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." Second, once a witness is shown to be unavailable, "his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded,

at least absent a showing of particularized guarantees of trustworthiness."

497 U.S. 805, 814-15 (1990) (quoting *Roberts*, 448 U.S. at 65) (emphasis added).

This Court has inferred reliability where the evidence falls within a firmly rooted hearsay exception because those "hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'" *Roberts*, 448 U.S. at 66; *see White v. Illinois*, 502 U.S. 346, 355 & n.8 (1992) (stating that the Court has concluded that "firmly rooted" hearsay exceptions carry sufficient indicia of reliability to satisfy the Confrontation Clause because such statements "are made in contexts that provide substantial guarantees of their trustworthiness"); *see also Wright*, 497 U.S. at 817 ("[A]dmission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding and legislative experience in assessing the trustworthiness of certain types of out-of-court statements.").

Additionally, this Court has made clear that in assessing the particularized guarantees of trustworthiness of a hearsay statement, "the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." *Wright*, 497 U.S. at 819. Because statements falling under a firmly rooted hearsay exception are so inherently trustworthy that cross-examination is unnecessary to establish their reliability, and "[b]ecause evidence possessing 'particularized guarantees of trustworthiness' must be at least as reliable as evidence admitted under a firmly rooted hearsay exception, [the Court has concluded that] evidence admitted under the former requirement must similarly be so trustworthy that adversarial testing would add little to its reliability." *Id.* at 821 (citation omitted).

Tested by those standards, Mark Lilly's statements fell far short and should not have been admitted. Their admission violated Petitioner's constitutional rights.

A. A Custodial Confession By An Accomplice That Incriminates A Criminal Defendant Is Inherently Unreliable And Its Admission At Trial Violates The Confrontation Clause.

Under well-established caselaw, uncrossexamined hearsay statements like Mark Lilly's, which are part of a custodial confession by an accomplice that incriminates a defendant, are not admissible under Confrontation Clause analysis. This Court has consistently underscored the inherent and inevitable **unreliability** of such hearsay statements inculpating a defendant due to the strong incentive that a person arrested in incriminating circumstances has to shift blame onto others and curry favor with the authorities. Thus, the holding by the Virginia Supreme Court affirming admission of Mark Lilly's statements was plain constitutional error.

This Court has repeatedly "recognize[d] that th[e] truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination. . . . [S]uch a confession 'is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally. . . . More than this, however, the arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence.'" *Lee*, 476 U.S. at 541 (citation omitted); *Williamson v. United States*, 512 U.S. 594, 601 (1994) (quoting *Lee*); *Chambers v. Mississippi*, 410 U.S. 284, 299-300 (1973) (noting the view that "confessions of criminal activity are often motivated by extraneous considerations and, therefore, are not as inherently reliable as statements against pecuniary or proprietary interest"); *Bruton v. United States*, 391 U.S. 123, 136 (1968); *see also Williamson*, 512 U.S. at 607-08 (Ginsburg, J., concurring in part and in judgment); *Dutton v. Evans*, 400 U.S. 74, 98 (1970) (Harlan, J., concurring in result) (stating that he "would be prepared to hold as a matter of due process that a confession of an accomplice cannot be introduced as evidence of the guilt of an accused, absent some circumstance indicating authorization or adoption").

Indeed, the presumption that the custodial statements of a codefendant or accomplice implicating a defendant are unreliable is so strong that this Court has never countenanced their admission.[7] *See Lee*, 476 U.S. at 544-45; *Bruton*, 391 U.S. at 135-36; *Douglas v. Alabama*, 380 U.S. 415, 419 (1965). *See also New Mexico v. Earnest*, 477 U.S. 648, 649 (1986) (Rehnquist, J., concurring) (describing presumption as "weighty"). In *Douglas*, this Court reversed a conviction where the prosecutor read to the jury a confession made by the defendant's accomplice. Because the accomplice invoked his Fifth Amendment privilege when called to testify, the Court held that the defendant's "inability to cross-examine [the accomplice] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause." *Douglas*, 380 U.S. at 419. "This holding, on which the Court was unanimously agreed, was premised on the basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." *Lee*, 476 U.S. at 541.

Similarly, in *Bruton*, this Court reaffirmed its concern with the grave distortion to the truthfinding process resulting from admission of an accomplice's confession implicating a criminal defendant. The Court held that admission of a codefendant's confession at a joint trial violated the defendant's rights under the Confrontation Clause, notwithstanding the trial judge's instruction to the jury that the confession was admissible only against the codefendant. The Court concluded that because a confession that incriminates the defendant is so "devastating" and "inevitably suspect," the risk that the jury would not follow instructions was too great to be ignored, underscoring that "[t]he unreliability of such evidence is intolerably compounded when the alleged

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7 *Dutton*, which upheld the introduction of the admission without cross-examination of hearsay statements of a non-testifying declarant incriminating the defendant, is not to the contrary. In *Dutton*, the hearsay was not "crucial" or "devastating," and, more important, it did not involve a confession made "in the coercive atmosphere of official interrogation" or result in a "wholesale denial of cross examination." 400 U.S. at 87.

accomplice . . . does not testify and cannot be tested by cross-examination." *Bruton*, 391 U.S. at 135-36.

This Court in *Lee* reinforced the Constitutional underpinnings of such a result. In *Lee*, this Court stressed "the time-honored teaching that a codefendant's confession inculpating the accused is inherently unreliable, and that convictions supported by such evidence violate the constitutional right of confrontation." 476 U.S. at 546. The Court began its analysis by rejecting the "categorization of the hearsay involved in this case as a simple 'declaration against penal interest.'" *Id.* at 544 n.5. As the Court explained, "That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant." *Id.* Then, the Court determined that the presumption that the codefendant's confession could not be trusted as to the defendant's participation in the murders had not been rebutted. Specifically, the Court acknowledged the "reality of the criminal process . . . that once partners in a crime recognize that the 'jig is up,' they tend to lose any identity of interest and immediately become antagonists, rather than accomplices," and that "a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." *Id.* at 544-45.[8]

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8 Even the dissent in *Lee*, which would have concluded that the hearsay exception for declarations against interest is firmly established, recognized that "accomplice confessions ordinarily are untrustworthy precisely because they are not unambiguously adverse to the penal interest of the declarant. It is of course against one's penal interest to confess to criminal complicity, but often that interest can be advanced greatly by ascribing the bulk of the blame to one's confederates. It is in circumstances raising the latter possibility -- circumstances in which the accomplice's out-of-court statements implicating the defendant may be very much in the accomplice's penal interest -- that we have viewed the accomplice's statements as 'inevitably suspect.'" *Lee*, 476 U.S. at 552 (Blackmun, J., dissenting).

Thus, this Court has consistently concluded that the statements of an accomplice or codefendant which are made during custodial interrogation and which incriminate a criminal defendant are inherently unreliable and therefore inadmissible under the Confrontation Clause. This time-honored principle is amply reflected in the decisions of the lower courts. Most Courts of Appeals addressing the issue have concluded that custodial statements like the one at issue in this case are inadmissible under the Confrontation Clause.[9] Only a few cases have permitted admission of a statement made while in custody and in response to police interrogation, but none involved a statement like the one at issue in this case which minimized the declarant's role or shifted blame to others.[10] And the vast majority of cases allowing admission of a statement

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9 *See Crespin v. State of New Mexico*, 144 F.3d 641, 648 (10th Cir. 1998) (concluding there was no reason to depart "from time-honored teaching that a codefendant's confession inculpating the accused is inherently unreliable" where declarant "may reasonably have thought such a statement would decrease her practical exposure to criminal liability"); *United States v. Flores*, 985 F.2d 770, 780 (5th Cir. 1993) (concluding that "there is a[] category of statements against penal interest that should generally be regarded as inadmissible under the Confrontation Clause, particularly where the declarant's unavailability is due simply to invocation of the Fifth Amendment in response to actual or potential prosecution, namely statements accusatory of another taken by law enforcement with a view to prosecution"); *United States v. Magana-Olvera*, 917 F.2d 401, 409 (9th Cir. 1990) (finding statements were not sufficiently against interest where made while in custody, constituted an attempt to curry favor from authorities and trivialized declarant's role by shifting blame to defendant and therefore could not be admitted under Confrontation Clause); *Fuson v. Jago*, 773 F.2d 55, 61 (6th Cir. 1985) (concluding admission of statement by codefendant violated Sixth Amendment where made in response to custodial interrogation); *United States v. Coachman*, 727 F.2d 1293, 1297 (D.C. Cir. 1984) (finding admission of accomplice's confession implicating defendant violated Confrontation Clause); *Olson v. Green*, 668 F.2d 421, 427-28 (8th Cir. 1982) (noting inherent unreliability of custodial statements implicating a third person, and concluding that statements of accomplice to police did not bear sufficient indicia of reliability); *United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980) (finding written confession made while in custody "may thus have been motivated in part by the prospect of severe punishment for his crime if he did not cooperate and the desire to gain favor with the Government in the hope of obtaining release or reduced punishment"). *See also Williams v. State of Mississippi*, 667 So. 2d 15, 20-21(Miss. 1996) (noting "post-arrest statements made by one accused pointing the finger at another are as a matter of common experience among the least trustworthy of statements," and finding statement which "completely inculpated the defendant" inadmissible).

10 *See United States v. Keltner*, 147 F. 3d 662, 670 (8th Cir. 1998) (statement "clearly subjected" declarant to criminal liability for "activity in which [he] participated and was planning to participate with . . . both defendants"); *Earnest v. Dorsey*, 87 F.3d 1123, 1134 (10th Cir. 1996) (finding statement had

Footnote continued

inculpating a defendant have not involved statements to police.[11]

Accordingly, the decision of the Virginia Supreme Court flatly ignores this Court's Confrontation Clause jurisprudence, as well as that of the Courts of Appeals, which has consistently found custodial statements by an accomplice implicating a criminal defendant inherently unreliable. This Court should grant the petition to review and correct that error.

B. A Custodial Confession By An Accomplice That Incriminates A Criminal Defendant Does Not Fall Within A Firmly Rooted Exception To The Hearsay Rule.

There can be no legitimate question that this Court and others have uniformly rejected admission of statements of an accomplice or codefendant which are made during custodial interrogation and which implicate a criminal defendant as inherently unreliable and therefore inadmissible under the Confrontation Clause. This Court has done so without formally reaching – or needing to reach – the issue of whether the general category of declarations against penal

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particularized guarantees of trustworthiness where "entire statement inculpated both [defendant] and [declarant] equally" and "neither attempted to shift blame to his co-conspirators nor to curry favor from the police or prosecutor"); *State of Oregon v. Nielsen*, 853 P.2d 256, 263-64, 269-70 (Or. 1993) (finding statement reliable because it "admitted [declarant's] equally culpable involvement, rather than trying to shift blame").

11 *See, e.g., United States v. Moses*, No. 96-3632, 1998 WL 378812, *2 (3d Cir. July 9, 1998) (because statements were made to friend long before arrest, "there is no reason to believe that Gaudelli was trying to avoid criminal consequences by passing blame to Moses"); *Latine v. Mann*, 25 F.3d 1162, 1167 (2d Cir. 1994) (because statement was made to "a perceived ally, not to law enforcement officials," court concluded "it cannot be said that he made the statement in an effort to curry favor or in a coercive atmosphere"); *United States v. Bakhtiar*, 994 F.2d 970, 978 (2d Cir. 1993) (statements to informant which did not minimize declarant's culpability); *United States v. Harty*, 930 F.2d 1257, 1264-65 (7th Cir. 1991) (statements to informant made under circumstances where declarant had "strong motivation to recount events accurately"); *United States v. Layton*, 720 F.2d 548, 560 (9th Cir. 1983) ("[Jim] Jones's statements to [his lawyer and trusted advisor] were not made while in custody to curry favor with the police."); *United States v. Garris*, 616 F.2d 626, 632 (2d Cir. 1980) (pre-arrest statement which clearly implicated declarant but did not consistently inculpate defendant); *State of Oregon v. Wilson*, 918 P.2d 826, 837 & n.11 (Or. 1996) (noting that to whom the statement is made is an important factor and that declarant made statements implicating both declarant and defendant to a friend).

interest is a firmly rooted hearsay exception, describing the general category as "too large a class for meaningful Confrontation Clause analysis." *Lee*, 476 U.S. at 544 n.5. However, the sub-category of that general category at issue here – limited to custodial statements by an accomplice inculpating a criminal defendant – involves statements that are inherently unreliable and are not even within a proper hearsay exception at all under this Court's caselaw, much less a firmly rooted exception.

Four years ago, in a case involving the scope of the hearsay exception for statements against penal interest, this Court expressly declined to decide whether the hearsay exception for statements against penal interest is firmly rooted for Confrontation Clause purposes. *Williamson*, 512 U.S. at 605. In so doing, however, this Court made crystal clear that statements of an accomplice which incriminate a defendant are not within the hearsay exception of Rule 804(b)(3) of the Federal Rules of Evidence. Citing its oft-repeated conclusion that custodial post-arrest statements of a codefendant have traditionally been viewed with special suspicion and considered less credible than ordinary hearsay evidence, the Court concluded that a "district court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else." *Id.* at 601. With respect to the particular statements at issue, the Court could not "conclude that all that Harris said was properly admitted." *Id.* at 604. Specifically, the Court concluded that "parts of [Harris'] confession, especially the parts that implicated Williamson, did little to subject Harris himself to criminal liability. A reasonable person in Harris' position might even think that implicating someone else would decrease his practical exposure to criminal liability . . . ." *Id.* Because neither the district court nor the Court of Appeals had inquired whether each of the statements in Harris' confessions was truly self-inculpatory, the Court remanded for this assessment to be made. *Id.*

Three Courts of Appeals, expressly following this Court's teachings in *Lee*, *Bruton*, and *Douglas*, have held that the exception for declarations against interest cannot be deemed firmly rooted as applied to statements by an accomplice which incriminate a defendant. *Earnest v.*

Dorsey, 87 F.3d 1123, 1131 (10th Cir. 1996); *United States v. Flores*, 985 F.2d 770, 776 n.13 (5th Cir. 1993); *Olson v. Green*, 668 F.2d 421, 427 & nn. 10, 11 (8th Cir. 1982) ("United States Supreme Court decisions, as well as decisions from the courts of appeals, indicate that custodial statements implicating a third person do not fall within a firmly rooted hearsay exception."). As the Tenth Circuit recently concluded:

> Generally, evidence is presumptively reliable if it comes within a firmly rooted hearsay exception. [The codefendant's custodial] statement . . . cannot be immunized by the exception for statements against interest. Although it is a statement against penal interest . . . , the Supreme Court has held that in this context that hearsay exception "defines too large a class for meaningful Confrontation Clause analysis." *Lee v. Illinois*, 476 U.S. 530, 544 n.5, 106 S. Ct. 2056, 2064 n.5, 90 L. Ed. 2d 514 (1986). Moreover, custodial confessions "have traditionally been viewed with special suspicion." *Id.* at 541, 106 S. Ct. at 2062. Therefore, [the codefendant's] statement was "presumptively unreliable," *id.*, and was admissible against [the defendant] only if the state demonstrated "particularized guarantees of trustworthiness. *Id.* at 543, 106 S. Ct. at 2063.

Earnest, 87 F.3d at 1131.[12]

Six other Courts of Appeals, along with the Virginia Supreme Court, however, have suggested that the general category of hearsay exceptions for declarations against penal interest is firmly rooted, and have applied that general exception to a broad category of statements. *United States v. Keltner*, 147 F.3d 662, 671 (8th Cir. 1998); *United States v. York*, 933 F.2d 1343, 1362-64 (7th Cir. 1991); *Jennings v. Maynard*, 946 F.2d 1502, 1505-06 (10th Cir. 1991); *United States v. Taggart*, 944 F.2d 837, 840 (11th Cir. 1991); *United States v. Seeley*, 892 F.2d 1, 2 (1st Cir.

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12 The Fifth Circuit in *Flores* further doubted that, from a historical perspective, the exception could fairly be deemed firmly rooted. 985 F.2d at 776 n.13. Noting that the common law did not recognize an exception for statements against penal interest, and that it was not until 1975 that the Federal Rules permitted admission of statements against penal interest, the court concluded that "[t]he relatively recent recognition of declarations against penal interest as an exception to the hearsay rule by the Federal Rules of Evidence would seem to counsel against a headlong rush to broadly embrace the exception as providing a sufficient substitute for cross-examination and personal confrontation in cases of the present kind." *Id.* at 778-79.

1989) (concluding that the exception "would seem to be 'firmly rooted'"); *United States v. Katsougrakis*, 715 F.2d 769, 775 (2d Cir. 1983).

However, as noted above, the proper inquiry is not whether there is a firmly rooted general hearsay exception covering declarations against penal interest. Rather, the proper constitutional analysis is whether the admission of a custodial confession by an accomplice inculpating a defendant falls within a firmly rooted hearsay exception. Whatever can be said about the status of the general exception for declarations against penal interest, there is no hearsay exception lawfully covering custodial confessions by an accomplice inculpating a defendant. *See Williamson*, 512 U.S. at 601, 604-05.

This Court should also grant the petition and issue a writ of certiorari to ensure that the Circuit Courts of Appeals and the state courts of last resort uniformly follow this Court's conclusion in *Lee* that the general category of statements against penal interest is "too large a class for meaningful confrontation clause analysis," 476 U.S. at 544 n.5, and to resolve the split in authority as to whether the statements of an accomplice incriminating a defendant fall within a firmly rooted hearsay exception.

C. Mark Lilly's Post-Arrest Statements Implicating Petitioner Are Inadmissible Because They Do Not Bear Particularized Guarantees Of Trustworthiness.

Because Mark Lilly's custodial statements are inherently unreliable, they were inadmissible unless their reliability is supported by "particularized guarantees of trustworthiness." *Wright*, 497 U.S. at 815; *see also Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972). In *Wright*, this Court held that the particularized guarantees of trustworthiness include **only** those circumstances that "surround the making of the statement and that render the declarant particularly worthy of belief." 497 U.S. at 819. This Court premised its holding on the rationale for permitting exceptions to the hearsay rule. As the Court reasoned, the various hearsay exceptions are founded on circumstantial guarantees of trustworthiness "that existed at the time the statement was made and do not include those that may be added by using hindsight," and the same should apply under the

Confrontation Clause. *Id.* at 820 (citation omitted). This Court specifically prohibited consideration of corroborating evidence because it "would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility." *Id.* at 823. Accordingly, "[t]o be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Id.* at 822.

Here, the circumstances surrounding the making of Mark Lilly's statements implicating Petitioner completely undermine their reliability. Indeed, no court, apart from the Virginia Supreme Court, has ever admitted uncross-examined hearsay statements inculpating a criminal defendant that were made while in custody and in response to police interrogation, minimized the declarant's role in the offenses while consistently shifting responsibility to others, and accepted responsibility for a significantly less serious offense than the one in which the defendant was implicated. Despite this Court's clear prohibition on the use of corroborating evidence to establish particularized guarantees of trustworthiness, moreover, the Virginia Supreme Court expressly ignored the indicia of "inherent trustworthiness" of Mark Lilly's statements – because there were none – and instead considered other allegedly corroborating evidence presented at trial. That decision merits review by this Court for at least two reasons: first, indicia of inherent trustworthiness of the statements by Mark Lilly – the only indicia permitted to be considered by this Court's rulings – concededly were entirely lacking; and second, certain Courts of Appeals and state courts of last resort, including the Virginia Supreme Court, permit the use of corroborating evidence of reliability, contrary to this Court's holding in *Wright* limiting the inquiry to inherent trustworthiness, and not by reference to other evidence at trial.

1. Inherent Indicia

It is not surprising that the Supreme Court of Virginia ignored the circumstances surrounding the making of Mark Lilly's statements to police. Those circumstances belie any guarantees of trustworthiness and, in fact, confirm the statements' inherent unreliability. Mark Lilly made his statements after having been arrested and held in custody for several hours,[13] and his statements were not spontaneous, but instead were made in response to police interrogation by several officers over the course of more than an hour. This Court and lower courts have consistently recognized that such circumstances render statements unreliable.[14]

More important, as this Court has concluded, having been arrested and subjected to interrogation regarding a number of robberies and a murder, Mark Lilly had a tremendous incentive to minimize his own role and to shift or spread blame, curry favor, avenge himself or divert attention to another. *Lee*, 476 U.S. at 545; *Williamson*, 512 U.S. at 604 (noting that a

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13 Although Mark Lilly was apprised of his rights under *Miranda*, his statements are unreliable because they were made before he had any contact with an attorney or his family. *United States v. Boyce*, 849 F.2d 833, 836 (3d Cir. 1988) (finding statement unreliable in part because "McMahon gave his statement while in custody at the Brooklyn House of Detention before he had the benefit of counsel.").

14 *See Dutton*, 400 U.S. at 87 (distinguishing inculpatory statement of a declarant to a fellow prisoner from those made "in the coercive atmosphere of an official interrogation"); *id.* at 88-89 (concluding spontaneity of statement provided indicia of reliability); *Chambers*, 410 U.S. at 300 (same); *United States v. Costa*, 31 F.3d 1073, 1079 (11th Cir. 1994) (finding statement unreliable in part because not a spontaneous declaration to friends or confederates but a custodial confession); *Fuson v. Jago*, 773 F.2d 55, 61 (6th Cir. 1985) (finding statement not reliable in part because "declarant made no spontaneous utterance; his oral confession was made in response to custodial interrogation"); *United States v. Riley*, 657 F.2d 1377, 1384 (8th Cir. 1981) (noting statements made while in custody and in response to police questioning); *United States v. Palumbo II*, 639 F.2d 123, 128 (3d Cir. 1981) ("More importantly, the statement was made while Pfaff was in police custody in response to police questioning."); *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1102 (5th Cir. 1981) ("This was not a spontaneous declaration made to friends and confederates, but a custodial confession, given under potentially coercive circumstances . . . ."); *United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980) (finding statement unreliable in part because "[a]t the time when Oliver gave his statement to the FBI agent he was under arrest, facing a probable long term prison sentence for a bank robbery"); *United States v. Love*, 592 F.2d 1022, 1025 (8th Cir. 1979) (finding statement unreliable in part because made while in custody).

reasonable person in such a situation "might even think that implicating someone else would decrease his practical exposure to criminal liability, at least so far as sentencing goes. Small fish in a big conspiracy often get shorter sentences than people who are running the show . . . especially if the small fish are willing to help the authorities catch the big ones") (citations omitted). *See also, e.g., Flores*, 985 F.2d at 782 (concluding that "statements by suspects to law enforcement officials inculpatory of third parties are excluded because of the *presumption* that [the] motive[] [to shift the blame to others so as to receive a lesser sentence] exist[s]"); *United States v. Palumbo II*, 639 F.2d 123, 128 (3d Cir. 1981) ("There is a very real danger that the motivation for the revelation [implicating the defendant] may not have been to further truth, but rather to curry favor with the authorities.") (citation and internal quotation marks omitted).

Mark Lilly's statements to police bear this incentive out, consistently exculpating himself and inculpating others. Mark Lilly effectively said to the authorities that while he had gotten painfully drunk and stolen some beer, Petitioner and Barker had engaged in a rampant crime spree throughout several Virginia counties. He trivialized his role to the point that he appears something of a bystander who merely happened to be present when the various crimes were committed, contrary to the testimony of Barker, which, as noted above, portrayed Mark Lilly as more active in the murder and the robberies. He shifted virtually all responsibility for criminal conduct onto Barker and Ben Lilly, identifying Barker as being responsible for the robberies and Ben Lilly as being responsible for the carjacking and shooting. His statements, accordingly, cannot be considered truly self-inculpatory, and therefore cannot be deemed reliable. *See, e.g., United States v. Innamorati*, 996 F.2d 456, 475 (1st Cir. 1993) (finding inadmissible a co-defendant's statement that "admitted to a few acts of logistical assistance" while maintaining that "others were guilty of wrongdoing from which [the declarant] had been excluded but happened to have some knowledge" because the statement was not contrary to the declarant's self-interest at the time the statement was made); *Flores*, 985 F. 2d at 782 ("Taking on the full blame for a minor role in an offense, such as claiming to be a mere courier in a drug conspiracy, does little to demonstrate trustworthiness because the declarant still has the motive to shift the blame to others

so as to receive a lesser penalty."); *United States v. Magana-Olvera*, 917 F.2d 401, 409 (9th Cir. 1990) (finding statements unreliable where they "trivialized [the declarant's] role in the drug conspiracy by pointing to Magana as the 'kingpin'"); *United States v. Love*, 592 F.2d 1022, 1025-26 (8th Cir. 1979) (finding inadmissible a co-defendant's statement to police because the declarant, fearing prosecution for aiding and abetting, "may well have believed it was in her best interest to make a statement implicating [the defendant] as the instigator in order to ingratiate herself with the F.B.I. and divert attention to another").

To the extent, moreover, that Mark Lilly implicated himself in any crimes, such as the robbery of the residence the night before the murder, that he inculpated Petitioner in a significantly more serious crime further undermines the reliability of his statements. *United States v. Riley*, 657 F.2d 1377, 1384 (8th Cir. 1981) (concluding that the declarant's admitting culpability for a crime that is significantly less serious than the crime for which the declarant is inculpating the defendant is a factor indicating the unreliability of the statement in question). Finally, Mark Lilly's repeated references to his drunkenness as an explanation for his lack of memory and his participation in the crimes likewise undermine the reliability of his statements. *Crespin v. State of New Mexico*, 144 F.3d 641, 648 (10th Cir. 1998) (finding statement unreliable in part because declarant stated she could not remember the extent of her participation in the crimes because she had been in a "drunken state" at the time).

Thus, based on the circumstances surrounding the making of Mark Lilly's statements, the only indicia of reliability to be assessed under this Court's case law in determining their inherent trustworthiness, those statements should not have been admitted because they were not supported by particularized guarantees of trustworthiness. Indeed, no Court of Appeals has ever admitted a post-arrest custodial statement which is made in response to police questioning and which minimizes the declarant's role in the criminal activity while shifting responsibility onto others. Accordingly, because Mark Lilly's statements were inherently unreliable, their admission violated Lilly's critical constitutional rights to confront the witnesses against him, and denied him the opportunity to cross-examine Mark Lilly, challenge his credibility, and test the veracity of

evidence that so severely incriminated him and likely resulted in his conviction for first-degree murder and his death sentence.

2. The Split in the Circuits and Courts of Last Resort Regarding the Use Of Corroborating Evidence

In *Williamson*, this Court noted that the Courts of Appeal are divided regarding the use of corroborating evidence to establish a statement's reliability. 512 U.S. at 605. In fact, only three Circuit Courts of Appeals currently follow the standard set forth by this Court in *Wright* and hold that the hearsay statement at issue must be evaluated independent of any other evidence introduced at trial, while four others allow review of other evidence introduced at trial to gauge the veracity of the statement at issue. *See Flores*, 985 F.2d at 775 (stating that the Supreme Court of the United States held in *Wright* that "corroborating evidence may not be considered in determining whether a statement may be admitted under the Confrontation Clause where . . . the statement is presumed to be unreliable"); *United States v. Gomez-Lemos*, 939 F.2d 326, 332 (6th Cir. 1991) (concluding district court improperly admitted grand jury testimony of the defendant's accomplices after finding "significant in its reliability analysis the fact that the hearsay testimony . . . was corroborated" by other evidence); *United States v. Harty*, 930 F.2d 1257, 1264 (7th Cir. 1991) (stating that hearsay statements made by the defendant's accomplice "must be inherently reliable because of the circumstances surrounding" the making of the statements). *But see United States v. Garris*, 616 F.2d 626, 632-33 (2d Cir. 1980) (finding hearsay statements made by the defendant's sister to an F.B.I. agent during an interview at F.B.I. headquarters admissible in part because her statements were corroborated by the testimony of other witnesses at trial); *United States v. Bailey*, 581 F.2d 341, 349 (3d Cir. 1978) ("[T]he trustworthiness of a [hearsay] statement should be analyzed by evaluating not only the *facts corroborating the veracity of the statement*, but also the circumstances in which the declarant made the statement and the incentive he had to speak truthfully or falsely.") (emphasis added); *United States v. Keltner*, 147 F.3d 662, 670-71 (8th Cir. 1998) (finding admissible as a declaration against interest a statement made by a

co-conspirator to F.B.I. agents, who offered the declarant early release from prison and immunity for several other crimes in exchange for his cooperation, because "[t]he information [the declarant] gave to the F.B.I. was supported by corroborating circumstances"; *United States v. Candoli*, 870 F.2d 496, 510 (9th Cir. 1989) (finding an inculpatory hearsay statement admissible due to other corroborating evidence introduced at trial and noting that "those circuits which have read 'the corroboration expressly required for exculpatory statements into the rule as applied to inculpatory statements [have done so] in order to satisfy the confrontation clause'") (citation omitted).

The state courts are similarly divided. *Compare Chandler v. Commonwealth of Virginia*, 455 S.E.2d 219, 224 (Va. 1995) ("[T]he reliability of . . . [the] statement is buttressed by the testimony of [another co-defendant], which placed [the declarant] in the vehicle during the commission of the robbery and murder.") *and Brown v. State of Wyoming*, 953 P.2d 1170, 1179 (Wyo. 1998) (post-arrest statement bore adequate indicia of reliability, in part because of corroborating evidence, and therefore admission did not violate the Confrontation Clause because particularized guarantees of trustworthiness were met) *and State of Ohio v. Gilliam*, 635 N.E.2d 1242, 1245-46 (Ohio 1994) (in-custody statement that was corroborated by independent evidence met the trustworthiness requirement of 804(b)(3) and therefore did not violate confrontation clause because it was admitted pursuant to a firmly rooted exception to the hearsay rule) *with Simmons v. State of Maryland*, 636 A.2d 463, 470 (Md. 1994) ("The State goes on to look to the testimony of the victims as corroborating [the declarant's] statement. This it may not do.") *and State of Nebraska v. Hughes*, 510 N.W.2d 33, 39 (Neb. 1993) (in-custody confession was not admissible because the state failed to overcome the presumption of unreliability in light of the totality of the circumstances surrounding the making of the statement).

This Court should also grant the petition and issue a writ of certiorari to ensure that the Circuits and state courts of last resort are uniform in following the mandate of *Wright* that "[t]o be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must

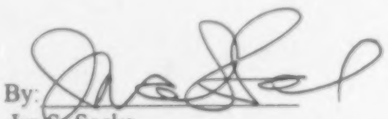
possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Wright*, 497 U.S. at 822.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
September 2, 1998

Respectfully submitted,



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